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DISTRICT OF ARIZONA
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

LaToya Moore,

Plaintiff,

v.

Argenbright Security,

Defendant.

CV-00-2048-PHX-ROS

Order

Pending before the Court are Defendant's Motion for Summary Judgment (Doc. #14), Defendant's Motion for Summary Disposition Regarding Defendant's Motion for Summary Judgment (Doc. #18), and Defendant's Motion to Strike Inadmissible Facts Presented by Plaintiff in Opposition to Motion for Summary Judgment (Doc. #26) ("Motion to Strike").[1]

Background

Plaintiff commenced this action on October 30, 2000. In her Complaint, Plaintiff alleges that she was subjected to sexual harassment while she was employed by Defendant. She also claims that she reported the misconduct of her co-workers to her employer, and as a result, Defendant retaliated against her. Specifically, she claims that Defendant retaliated

[1] The hearing on the Motion for Summary Judgment will be vacated because both parties provided the Court with complete memoranda thoroughly discussing the law and evidence in support of their respective positions. Oral argument would not have aided the Court's decisional process. See Partridge v. Reich, 141 F.3d 920, 926 (9th Cir. 1998) (stating that no prejudice results from denial of a hearing when the parties have had adequate opportunity to provide the court with evidence and memoranda of law).

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by forcing her to work harder, depriving her of breaks and other benefits, and depriving her of a raise in pay.

Defendant filed its Motion for Summary Judgment on February 8, 2001. On April 2, 2001, Defendant filed a Motion for Summary Disposition because Plaintiff failed to respond to the Motion for Summary Judgment within the time prescribed by Rule 1.10(l)(2), Rules of Practice for the United States District Court of the District of Arizona ("Local Rules"). Accordingly, the Court issued an Order on April 25, 2001, directing Plaintiff to file a Response to the Motion for Summary Judgment by May 7, 2001. Plaintiff filed a Response on May 4, 2001.

Discussion

I. Standard of Review

Where a party fails to respond to a motion for summary judgment, a court may not summarily grant the motion pursuant to Rule 1.10(i), Rules of Practice of the United States District Court for the District of Arizona. See Henry v. Gill, 983 F.2d 943, 950 (9th Cir. 1993) (finding that when the language of the local rule is permissive, the district court has discretion to grant summary judgment but only if the movant's papers are sufficient to support that motion by demonstrating the absence of a genuine issue of material fact); see also Marshal v. Gates, 44 F.3d 722, 724-25 (9th Cir. 1995) (stating that the sufficiency of the moving party's papers to establish a genuine issue of material fact is a paramount consideration while contemplating a default summary judgment). Rather, a court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (1996); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Jesinger v. Nevada Federal Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). Substantive law determines which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Jesinger, 24 F.3d at 1130. In addition, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary

judgment." Anderson, 477 U.S. at 248. The dispute must be genuine, that is, "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." Celotex, 477 U.S. at 323-24. Summary judgment is appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322; see also Citadel Holding Corp. v. Roven, 26 F.3d 960, 964 (9th Cir. 1994). The moving party need not disprove matters on which the opponent has the burden of proof at trial. Celotex, 477 U.S. at 323.

Furthermore, the party opposing summary judgment "may not rest upon the mere allegations or denials of [the party's] pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Brinson v. Linda Rose Joint Venture, 53 F.3d 1044, 1049 (9th Cir. 1995). There is no issue for trial unless there is sufficient evidence favoring the non-moving party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson, 477 U.S. at 249-50. However, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970)).

II. Analysis

Defendant moves for summary judgment on all counts of the Complaint. First, Defendant argues that this action is time-barred pursuant to 42 U.S.C. § 2000e-5(f)(1). Defendant also contends that Plaintiff failed to exhaust her administrative remedies prior to bringing her retaliation claim. Because Plaintiff has filed a Response to the Motion for Summary Judgment, Defendant's Motion for Summary Disposition Regarding Defendant's Motion for Summary Judgment will be denied. See Henry, 983 F.2d at 950.

A. Statute of Limitations

When the Equal Employment Opportunity Commission ("EEOC") dismisses a charge

filed by an aggrieved person against her employer, the aggrieved person may bring a civil action against the employer within ninety days after the EEOC "gives" the aggrieved person notice of her right to sue.[2] 42 U.S.C. 2000e-5(f)(1). The statute provides in relevant part:

> If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

Id. (emphasis added). This ninety-day period is a statute of limitations which begins to run when service of the notice is "attempted at the address of record[.]" Nelmida v. Shelly Eurocars, Inc., 112 F.3d 380, 384 (9th Cir. 1996), cert. denied, 522 U.S. 858 (1997) (citing St. Louis v. Alverno College, 744 F.2d 1314, 1317 (7th Cir. 1984) (the ninety-day limitations period "began running on the date the notice was delivered to the most recent address plaintiff provided the EEOC")); see also Scholar v. Pacific Bell, 963 F.2d 264, 267 (9th Cir.), cert. denied, 506 U.S. 868 (1992) (the 90-day period "run[s] from the 'giving of such notice'"); Nowell v. Harrison, Walker, & Harper, L.L.P., 80 F. Supp. 2d 622, 625 (E.D. Tex. 1999) ("the 90-day limitations period begins to run only when a claimant receives actual or constructive notice that the EEOC has completed its efforts"). If a civil action is not filed within the ninety-day period, it is time-barred. Scholar, 963 F.2d at 267. It is a plaintiff's burden to establish that an action was filed within the 90-day limitations period. See Martinez v. United States Sugar Corp., 880 F. Supp. 773, 777 (M.D. Fla. 1995), aff'd, 77 F.3d 497 (11th Cir. 1996) (Table); Cameron v. Wofford, 955 F. Supp. 1319 (D. Kan. 1997).

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[2] The "Notice of Suit Rights" ("Notice") attached to Defendant's Statement of Facts states: "If you decide to sue, you must sue WITHIN 90 DAYS from your receipt of this Notice." (Doc. #15, Exh. 2) (emphasis added).

Because the EEOC issued and mailed the Notice to Plaintiff on September 30, 1999, Defendant argues that Plaintiff had ninety days from October 5, 1999, to file this lawsuit. Plaintiff does not dispute that the Notice was issued on September 30, 1999. She contends, however, that she did not receive it until August 16, 2000, because it was originally mailed to the wrong address.

The Court must first resolve whether the limitations period prescribed by 42 U.S.C. § 2000e-5(f)(1) began to run in the manner suggested by Defendant. In her Response to Defendant's Motion, Plaintiff asserts that the Notice was not mailed to the address which she originally gave to the EEOC. The Notice issued by the EEOC indicates that it was mailed on September 30, 1999, to Ms. Latoya Moore, 815 East Colter #354, Phoenix, AZ 85014. (Doc. #15, Exh. 2).[3] However, according to the Charge of Discrimination, Plaintiff resided at apartment #359 at the time she filed the Charge, not apartment #354. (Id., Exh. 1).[4]

In its Reply, Defendant does not deny Plaintiff's assertion that the Notice was mailed to the incorrect apartment, nor does Defendant contend that the Notice was mailed to Plaintiff's "address of record," namely, the most recent address she had provided to the EEOC. See Nelmida, 112 F.3d at 384; St. Louis, 744 F.2d at 1317. The Court finds that no evidence has been submitted which shows that the EEOC mailed the Notice to Plaintiff's "address of record," and accordingly, the 90-day limitations period did not begin to run when

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[3] Plaintiff has also submitted the cover letter from the EEOC which accompanied the Notice, and it indicates that it was mailed to apartment #354. (Doc. #24, Exh. F). Defendant does not dispute the admissibility of this cover letter.

[4] Plaintiff admits that at the time the EEOC mailed the right to sue letter, she no longer resided at apartment #359, because she had moved to a new address (1645 E. Thomas Apt. 31, Phoenix, Arizona, 85016) in March, 1999. Plaintiff's failure to apprise the EEOC of her change of address violated 29 C.F.R. § 1061.7(b). Furthermore, Plaintiff's contention that she left a forwarding address with the post office is unsworn, and Defendant has moved to strike it on the grounds that it is inadmissible. The Court will grant Defendant's Motion to Strike in this regard. See Fed. R. Civ. P. 56(e); see also Scharf v. United States Attorney General, 597 F.2d 1240, 1243 (9th Cir. 1979) (motion to strike should be filed to address formal defects in documentation submitted in connection with a motion for summary judgment).

the Notice was delivered to the wrong apartment, because the Notice was not properly "given" at that time pursuant to 42 U.S.C. § 2000e-5(f)(1). See id.; see also Scholar, 963 F.2d at 267.[5] The Court reaches this conclusion even though Plaintiff admits that she no longer lived at the apartment on East Colter when the Notice was issued, because the statute of limitations could not begin to run until notice was properly given by the EEOC. See Scholar, 963 F.2d at 267.

No evidence has been presented which shows when the statute of limitations actually began to run. Because Defendant contends that Plaintiff failed to timely file this action, it is Plaintiff's burden to prove with admissible evidence that this action was timely filed. See Cameron, 955 F. Supp. at 1323; Martinez, 880 F. Supp. at 777; Fed. R. Civ. P. 56(e). Plaintiff has submitted no admissible evidence which establishes when notice was properly given pursuant to 42 U.S.C. § 2000e-5(f)(1), and she therefore has not met her burden.[6] The

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[5] The EEOC Compliance Manual at ¶ 254, § 4.4(c), requires the EEOC to "make reasonable efforts to locate" the charging party if mail is returned undelivered. Under such circumstances, at a minimum, § 4.4(c) requires the EEOC to "[r]eview the file to find a more accurate address[.]"

[6] Although Plaintiff is representing herself without the benefit of legal counsel, she is required to comply with all applicable rules with which attorneys are required to comply, including the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and the Local Rules. See King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1986) ("Pro se litigants must follow the same rules of procedure that govern other litigants."); Jacobsen v. Filler, 790 F.2d 1362, 1364-67 (9th Cir. 1986) (a court is not required to advise a non-prisoner pro se litigant of the requirements of Fed. R. Civ. P. 56 before entering summary judgment); see also Rand v. Rowland, 154 F.3d 952, 957-58, 964, 965-68 (9th Cir. 1998), cert. denied, 527 U.S. 1035 (1999). Plaintiff's Response to Defendant's Motion for Summary Judgment was not in compliance with Local Rule 1.10(l), because she failed to file a separate statement of facts. In addition, Plaintiff's evidence in support of her Response was not in compliance with Rule 56(e) of the Federal Rules of Civil Procedure, which requires that properly sworn affidavits be provided to demonstrate the admissibility of the evidence presented.

Defendant, too, seems to have forgotten this pivotal rule, because its exhibits were not accompanied by an affidavit. However, the exhibits provided by Defendant were also provided by Plaintiff, and Defendant did not object to Plaintiff's exhibits to the extent they were identical to Defendant's exhibits.

Court will therefore grant the Motion for Summary Judgment. Because the Court is able to resolve the statute of limitations issue based solely upon the admissible evidence and the legal arguments of the parties, the Court will deny Defendant's Motion to Strike as moot, except to the extent the Motion to Strike has already been granted. See supra at n.4.[7]

B. Exhaustion of Remedies

Defendant asserts that Plaintiff's retaliation claim was not presented to the EEOC and is not exhausted. "When a plaintiff fails to raise a Title VII claim before the EEOC, the district court lacks subject matter jurisdiction to hear it." Lowe v. City of Monrovia, 775 F.2d 998, 1003 (9th Cir. 1985) (cite omitted), amended on other grounds, 784 F.2d 1407 (9th Cir. 1986). "The EEOC charge must be construed 'with the utmost liberality.'" Yamaguchi v. United States Dept. of the Air Force, 109 F.3d 1475, 1480 (9th Cir. 1997). "[A] federal court has jurisdiction over claims 'reasonably related to the allegations of the EEOC charge.'" Shah v. Mt. Zion Hosp. and Medical Center, 642 F.2d 268, 271 (9th Cir. 1981). "In determining whether an allegation under Title VII is like or reasonably related to allegations contained in a previous EEOC charge, the court inquires whether the original EEOC investigation would have encompassed the additional charges." Green v. Los Angeles County Superintendent of Schools, 883 F.2d 1472, 1476 (9th Cir. 1989).

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[7] Defendant moves to strike many of the facts set forth in Plaintiff's Response to Defendant's Motion for Summary Judgment, as well as several of Plaintiff's exhibits. Defendant also contends that Plaintiff failed to provide a statement of facts in accordance with Local Rule 1.10(l), and she failed to controvert Defendant's statement of facts. Defendant then argues that Plaintiff's Response is based almost entirely upon inadmissible evidence.

Although the Court will deny Defendant's Motion to Strike as moot, the Court finds that Defendant has timely objected to the admissibility of Plaintiff's evidence. See Scharf, 597 F.2d at 1243 (motion to strike should be filed to challenge the admissibility of evidence submitted in connection with a motion for summary judgment). To the extent Plaintiff's Response makes factual assertions which are not supported by admissible evidence, the Court has not considered those assertions, which comprise the bulk of Plaintiff's Response. See Fed. R. Civ. P. 56(e). However, to the extent her Response makes arguments with respect to the uncontroverted evidence, the Court has considered the Response.

The Court has reviewed the Charge of Discrimination presented to the EEOC and concludes that Plaintiff did not present a retaliation claim to the EEOC. The entire particulars of Plaintiff's Charge are as follows:

> PERSONAL HARM: Beginning in March of 1998 and continuing through the present date, I have been subjected to numerous acts of harassment and sexual harassment, and the respondent has failed to take any disciplinary actions against the harassers, even after I have complained to management. For example, during the referenced time period, I have been subjected to numerous sexual comments from Jeff (Lead Security Guard), Charles (Security Guard), Penny (Supervisor), Tyrone (Security Guard - no longer employed with the respondent), and possibly other employees. I reported the sexual comments to Tracy (Supervisor), in or about April of 1998, but she failed to take any disciplinary action against those employees who were making the sexual comments. The referenced employees then continued making sexual comments, and I then wrote a letter to Joe (Manager), on or about May 12, 1998, and I complained about the sexual harassment in my letter. Joe then failed to take any disciplinary action against the referenced employees, and they are still (as of the present date) continually harassing me and subjecting me to sexual comments. In addition, Joel (Security Guard) touched me inappropriately in May of 1998, and I reported this incident to Penny (Supervisor).
>
> Respondent's Reasons for Adverse Actions: The respondent has not provided any reasons for the adverse actions.
>
> DISCRIMINATION STATEMENT: I believe that I am being discriminated against because of my sex, female, in violation of Title VII of the Civil Rights Act of 1964, as amended.

(Motion, Exh. 1). Not once did Plaintiff allege that Defendant retaliated against her for any reason. The Court also finds that the EEOC's investigation of Plaintiff's discrimination claim would not have encompassed an investigation of Plaintiff's retaliation claim, particularly because Plaintiff did not allege any facts in the EEOC Charge to suggest that there had been retaliation, and she only selected the box labeled "sex" and not the box labeled "retaliation" on the Charge. See Green, 883 F.2d at 1476. In addition, the Court finds that the retaliation claim Plaintiff now asserts in her Complaint is not reasonably related to the allegations contained in her EEOC Charge. See Shah, 642 F.2d at 271. Accordingly, the Court will grant Defendant's Motion for Summary Judgment on Plaintiff's retaliation claim.

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Disposition Regarding Defendant's Motion for Summary Judgment (Doc. #18) is **DENIED**.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment (Doc. #14) is **GRANTED.**

IT IS FURTHER ORDERED that Defendant's Motion to Strike (Doc. #26) is **GRANTED** with respect to Plaintiff's contention that she left a forwarding address with the post office, but in all other respects the Motion to Strike is **DENIED** as moot.

IT IS FURTHER ORDERED that the hearing scheduled to occur on June 22, 2001, at 10:30 a.m. is **VACATED.**

DATED this 6 day of June, 2001.

Roslyn O. Silver
United States District Judge